STATE OF MICHIGAN
IN THE SUPREME COURT

AMELIA HOSEY,

Plaintiff-Appellee,

Supreme Court No. 131213
Court of Appeals No. 257709
Oakland Co. Case No. 03-050311-NI

v

CHANTAY STARGHILL BERRY,

Defendant-Appellant.

AMICUS CURIAE BRIEF OF THE MICHIGAN TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE AND DENIAL OF APPLICATION FOR LEAVE

131213

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Interest of Amicus Curiae

This Michigan Trial Lawyers Association is an organization of Michigan lawyers engaged primarily in litigation and trial work. MTLA consists of more than 2400 member attorneys and recognizes an obligation to assist this Court on important issues of law that would affect substantially the orderly administration of justice in the trial courts of this state. This Court has invited MTLA to file this amicus curiae Brief.

Counter-Statement of Question Presented

DID THE COURT OF APPEALS PROPERLY ENFORCE THE PLAIN LANGUAGE OF MCR 2.116(G)(6) BY REQUIRING THE TRIAL COURT TO CONSIDER THE ADMISSIBLE SUBSTANCE AND CONTENT OF DOCUMENTS OFFERED IN OPPOSITION TO A MOTION UNDER MCR 2.116(C)(10)?

Amicus Curiae MTLA answers, "Yes."

Argument

THE PLAIN LANGUAGE OF MCR 2.116(G)(6) REQUIRES A TRIAL COURT TO DETERMINE WHETHER THE SUBSTANCE AND CONTENT OF DOCUMENTS OFFERED IN OPPOSITION TO A MOTION UNDER MCR 2.116(C)(10) ARE ADMISSIBLE AND CREATE A GENUINE ISSUE OF MATERIAL FACT.

As this Court has said on many occasions, the plain and unambiguous language of a statute controls. *Devillers v. Auto Club Ins. Ass'n,* 473 Mich. 562, 483; 702 N.W.2d 539 (2005) ("Statutory-or contractual-language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court."). Statutory language must be given its plain meaning and courts must not rewrite statutory language. *Cameron v. Auto Club Ins. Ass'n,* 476 Mich. 55, 63; 718 N.W.2d 784 (2006)("We believe this ruling was erroneous for the most uncomplicated reason; namely, that we must assume that the thing the Legislature wants is best understood by reading what it said."); *Griffith v. State Farm Mut. Auto. Ins. Co.,* 472 Mich. 521, 526; 697 N.W.2d 895 (2005)("When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted.")(citation omitted); *Cruz v State Farm Mut Auto Ins Co,* 466 Mich. 588, 594; 648 N.W.2d 591 (2002)("The primary rule of statutory construction is that, where the statutory language is clear and unambiguous, the statute must be applied as written.")(citation

omitted).

These same rules of statutory interpretation apply to the language of the Michigan Court Rules. *Grievance Administrator v. Underwood,* 462 Mich. 188; 612 N.W.2d 116 (2000). In *Grievance Administrator,* this Court stated:

> When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. *McAuley v. General Motors Corp.,* 457 Mich. 513, 518, 578 N.W.2d 282 (1998). Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. *See Tryc v. Michigan Veterans' Facility,* 451 Mich. 129, 135, 545 N.W.2d 642 (1996). Similarly, common words must be understood to have their everyday, plain meaning. *See* M.C.L. § 8.3a; MSA 2.212(1); *see also Perez v. Keeler Brass Co.,* 461 Mich. 602, 609, 608 N.W.2d 45 (2000).

462 Mich. at 193-94; *Hyslop v. Wojjusik,* 252 Mich.App. 500, 505; 652 N.W.2d 517 (2002)("The rules governing statutory interpretation apply equally to the interpretation of court rules. ... If the plain and ordinary meaning of the language employed is clear, then judicial construction is neither necessary nor permitted, and unless explicitly defined, every word or phrase should be accorded its plain and ordinary meaning, considering the context in which the words are used.")(citations omitted); *Yudashkin v. Linzmeyer,* 247 Mich.App. 642, 652; 637 N.W.2d 257 (2001)("We must avoid constructions that render any part of a court rule surplusage or nugatory.")(citations omitted). In this case, the Court of Appeals upheld and

enforced the plain language of the Michigan Court Rules as written.

The rule at issue, MCR 2.116(G)(6), provides that "[a]ffidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)--(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." The rule is consistent on the broad forms of documentary evidence allowed:

> (3) Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required (a) when the grounds asserted do not appear on the face of the pleadings, or (b) when judgment is sought based on subrule (C)(10).
> (4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

MCR 2.116(G)(3),(4). This Court has asked whether "a trial court, in deciding a motion for summary disposition, [is permitted] to consider unsworn statements or opinions of potential witnesses contained in documents that may be inadmissible at trial."

The plain language does not exalt form over substance. The rule includes

"documentary evidence" among the types of evidence used to oppose or support summary disposition under MCR 2.116(C)(10), along with affidavits, depositions, and admissions. The rule requires that the "content or substance" of any evidence (documents, affidavits, depositions) be admissible. The rule does not require that the form of the evidence itself be admissible. An interpretation that the form must be admissible would render the "content or substance" language superfluous.

The operative language regarding admissibility of evidence used to support or oppose summary disposition motions was added to MCR 2.116(G)(6) in 2000 (effective in 2001) to codify this Court's decision in *Maiden v. Rozwood,* 461 Mich. 109, 121; 597 N.W.2d 817 (1999). *See* Comment to 2000 Amendment. In *Maiden,* this Court clarified that the 1985 amendments had rejected the standard set forth in *Rizzo v. Kretschmer,* 389 Mich. 363; 207 N.W.2d 316 (1973), that summary disposition is appropriate only where it is "impossible for the claim to be supported by evidence at trial." 461 Mich. at 120. This Court continued:

> The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules.

461 Mich at 121. This Court held that "the **content or substance** of the evidence

proffered must be admissible in evidence." 461 Mich at 123.

In *Maiden,* this Court focused on a statement contained within a police report and concluded that the statement was inadmissible hearsay that did not come within any of the exceptions in the Michigan Rules of Evidence. While acknowledging that the police report itself arguably may be admissible, this Court concluded: "Because Myles' statement to the police describing the actions of the codefendants does not fall within any of the enumerated hearsay exceptions, the police report is inadmissible and may not be considered in opposing the motion for summary disposition." 461 Mich. at 125 (footnote omitted).[1]

The plain language of the amended MCR 2.116(G)(6) focuses on the content and substance of the evidence offered. "Content" and "substance" refer to the

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[1]This Court in *Maiden* also recognized that the focus on substance or content is consistent with the Federal Rules. 461 Mich. at 124 n. 6. The Federal Rules are more restrictive than the Michigan Rules because the Federal Rules do not contain the "documentary evidence" catchall, yet the Federal Rules still focus on the substance and content, not the form. *See Gleklen v. Democratic Congressional Campaign Committee, Inc,* 199 F.3d 1365, 1369 (C.A.D.C.2000)("While a nonmovant is not required to produce evidence in a form that would be admissible at trial, the evidence still must be capable of being converted into admissible evidence."); *Ashbrook v. Block,* 917 F.2d 918, 921 (C.A.6,1990)("Although the nonmoving party's evidence in opposition to summary judgment need not be of the sort admissible at trial, he must employ proof other than his pleadings and own affidavits to establish the existence of specific triable facts.")(citation omitted); *Macuba v. Deboer,* 193 F.3d 1316, 1322-24 (C.A.11,1999); *Imhof v. Metropolitan Life Ins. Co.,* 858 F.Supp. 91, 93 (E.D.Mich.,1994)("The evidence itself need not be the sort admissible at trial.")(citing *Ashbrook, supra*).

underlying nature of a thing, not its form. Webster's New Collegiate Dictionary (1959) defines "substance" and "content" as follows. "Substance" is:

> 1. That which underlies all outward manifestations; real, unchanging essence or nature of a thing; that in which qualities inhere; that which constitutes anything what it is. 2. Essential element or elements; characteristic components; as, the ideas are the same in substance. 3. Essential import; gist; as, the substance of what he said.

"Content" is:

> 1. Usually pl. That which is contained; as, the contents of a cask. 2. pl. The topics or matter treated in a document or the like. 3. The sum and substance; the gist, as of a discourse; hence, essential meaning.

In this case, there is no dispute that the doctor's reports constitute "documentary evidence," whether admissible or not.[2] The issue is whether the substance or content of (*i.e.*, the matters within) the reports is admissible.

The Court of Appeals properly and faithfully adhered to the plain language of the Court Rules: "Although the reports themselves are inadmissible, the doctors' opinions would be admissible in the form of opinion testimony at trial. ... Because the doctors' opinion testimony would be admissible at trial, their opinions, contained in the inadmissible reports, suffice to support plaintiff's response to defendant's motion for summary disposition. In their opinions, the doctors state that plaintiff's injuries

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[2]Otherwise, there would be no need for the distinction between admissible and inadmissible evidence and the rules of evidence would become superfluous.

were caused by the accident." The doctors' reports, regardless of form, contain the opinions of the doctors. Those opinions themselves are not hearsay, but opinions based on personal knowledge and professional expertise.[3]

Enforcement of the plain language of the rule serves the practical purpose of the rule as well. The rule is designed to weed out those cases for which no genuine material issue exists for trial. *E.g., Hall v. Hackley Hosp.*, 210 Mich.App. 48, 53; 532 N.W.2d 893 (1995)("A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim.")(citation omitted). While an affidavit or a deposition may be in admissible form, this does not mean that the substance or content is admissible. For example, an affidavit in which the affiant relates a statement made by a third party is insufficient because the statement itself is hearsay and not within one of the enumerated exceptions. *See Pitsch v. ESE Michigan, Inc.*, 233 Mich.App. 578, 598; 593 N.W.2d 565 (1999)("Plaintiff's representations in his affidavit regarding another person's observations do not establish a factual question because they are inadmissible hearsay.")(citation omitted); *Maiden, supra* (even if police report itself were admissible, the statements contained in the report – the substance or content of the report – were not). In this case, the doctors' opinions are

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[3]This is not to say that the trier of fact will agree with those opinions, but the opinions demonstrate that there are genuine issues for the fact finder to resolve.

reflected in the reports. This is not a situation in which the opinions themselves are hearsay or otherwise inadmissible. Indeed, the doctors will be able to testify as to causation between the accident and the injuries.

Furthermore, the rule does not require that the nonmoving party try the case on the summary disposition motion. Indeed, the nonmoving party has no control over when a summary disposition motion is brought. As a practical matter, the nonmoving party may not be able to obtain affidavits or deposition testimony of witnesses, particularly doctors, within the time for filing a response to such a motion.[4] To exalt form over substance, as the trial court did, is to ignore the plain language of the rule and to prevent a trier of fact from deciding legitimate and material disputed issues.

Conclusion

For all the aforementioned reasons, MTLA urges this Court to deny the application for leave to appeal and uphold the plain, unambiguous language of MCR 2.116(G)(6).

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[4]In its Order of September 15, 2006, this Court referred to "potential witnesses." Prior to actually being on the stand during trial or having a de bene esse deposition read at trial, all witnesses are "potential" witnesses. In this case, plaintiff could call the doctors live at trial.

Respectfully submitted,

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PROOF OF SERVICE

The foregoing Amicus Curiae Brief of the Michigan Trial Lawyers Association in Support of Plaintiff-Appellee and Denial of Application for Leave and this Proof were served on October 27, 2006 by first class mail, postage prepaid, to the following:

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